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Supreme Court of the United States

October Term, 1975

Nos. 74-1151 and 74-1419

PLANNED PARENTHOOD OF CENTRAL MISSOURI, et al.,

Appellants,

—vs.—

JOHN C. DANFORTH, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF AMICUS CURIAE ON BEHALF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE WOMEN'S LAW PROJECT

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STATEMENT OF INTEREST

The CENTER FOR CONSTITUTIONAL RIGHTS is a non-profit, tax exempt, educational and charitable corporation organized under New York law, and dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Since 1969, the Center has been at the forefront of the legal struggles of women to liberate themselves from the bondage of discriminatory and oppressive laws.

In particular, the Center played an instrumental role in the litigation leading up to the Supreme Court's landmark decision recognizing women's right to abortion in Roe v. Wade, 410 U.S. 113 (1973), and in successfully defending that decision against the legal offenses of the anti-abortion forces seeking to nullify and undermine that right.

The WOMEN'S LAW PROJECT is a non-profit, feminist legal organization in Philadelphia, Pennsylvania, working for the legal equality of women through litigation, public education, research and the representation of local women's groups. The Project is concerned with the implementation of state laws affecting women and their impact on the effectuation of a just transition to a system in which the legal rights and obligations of both sexes are equally recognized in all areas of life. Amicus is particularly expert in the interplay of laws which equalize opportunities for women in general with those delineating the rights and obligations of marriage and reproductive freedom.

Both the CENTER FOR CONSTITUTIONAL RIGHTS and the WOMEN'S LAW PROJECT view the emancipation of women from the stereotyped roles of the past as a critical

priority of this decade. Fundamental to this goal is the recognition and implementation of woman's right to abortion. Equally fundamental is the repudiation by the law of the land of the cage of paternalism which has relegated woman to second-class status in both the public and domestic spheres of life.

Amici see the assertion of state power to enforce a husband's veto over a woman's choice to abort, as inimical to the emancipation of women and as a repudiation of the important steps taken by this Court in its recent decisions in the area of reproductive control and equal protection to break the chains inherited from the past.

In this brief, amici draw upon their expertise and understanding of the blatant and subtle causes and forms of women's second-class status, particularly as respects the status of woman in the institution of marriage to illustrate for this

Court, the constitutional impermissibility of a rule which would subject a woman, in a matter so fundamental to her liberty, to the control of her husband.

QUESTION ADDRESSED

Whether Section 3(2) of House Bill 1211 which empowers husbands to veto the wife's decision to abort violates her rights under the First, Fourth, Fifth, Ninth and Fourteenth Amendments and authorizes involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

This Court's recognition in Roe v. Wade of the right of a woman to abortion, inhering in liberty and privacy guaranteed by the Fourteenth Amendment, must preclude the exercise of state authority to condition her choice to abort on the consent of her husband. The condition of marriage does not deprive her of her inalienable and fundamental individuality and personal right to control her body and reproductive capacity.

No compelling state interest has or can be demonstrated to override her personal choice. The State has no power to promote procreation in marriage generally, or because of the desire therefor of the husband. Nor can the State justify such power as promoting marital harmony.

For the State to enforce the will of the husband against the wishes of the wife in so fundamental a sphere is reprehensible. To tolerate such subjugation of her body and will to his desires necessitates and transcends even the limits of the husband's control over the wife as embodied in the common law of "coverture" and its vestiges which viewed woman as the property of her husband and premised marital harmony on the obliteration of her separate identity and will. To enforce the husband's will would repudiate not only the right to abortion but this Court's rejection, under the Equal Protection Clause, of sex-discriminatory statues and stereotypes.

The husband's own right to procreate does not entitle him to use an unwilling spouse's body for that purpose. The inviolability of the woman's right to abort may temporarily or permanently frustrate his own right to procreate in the context of that relationship, but the harm to him is incomparable to that of the woman irrevocably forced to undergo an unwanted pregnancy and nurture, perhaps, an unwanted child. To legally sanction his veto power would be to subject a woman to involuntary servitude.

ARGUMENT

I. THE RIGHT OF A WOMAN TO TERMINATE HER PREGNANCY IS A PERSONAL RIGHT WHICH CANNOT BE CONDITIONED ON THE CONSENT OF HUSBAND OR FATHER, WHETHER BY STATUTE OR COURT RULE.

The Amici here address the constitutionality of Section 3(2) of House Bill 1211 which requires that a woman obtain her spouse's consent before she may obtain an abortion.*/ The court below sustained this incursion on a woman's right to determine whether to have a child on three bases, a) the state's interest in insuring the reproductive capacity of

*/ Amici believe that other challenged sections of House Bill 1211 are also unconstitutional but we will not address this brief to those sections to avoid unnecessary duplication of matters addressed by other amici. We wish to note, that if §3(2) requiring the woman's own written consent is being utilized by the State of Missouri to deter a woman from obtaining an abortion it is unconstitutional. This court must distinguish such a burden on abortion from the importance of insuring that no surgical procedure be performed on a woman, or man, without the patient's informed consent, particularly in the area of reproductive freedom.

marriages, b) the assumption that procreation and mutuality of decision making foster trust and strengthen marital harmony and by implication, c) the husband's interest in the survival of a particular fetus. Planned Parenthood of Central Missouri v. Danforth, 372 F. Supp. 1362, 1370 (E.D. Mo. 1975). As Amici will demonstrate below, the lower court's decision ignores or distorts the rulings of this Court, constitutes an intolerable throwback to feudal notions of woman and marriage and is contrary to common sense.

Regardless of the euphemisms employed by the State of Missouri in seeking to justify its violation of a woman's most fundamental right to control her reproductive life, this Court cannot ignore what is at stake herein. For Missouri has here stated that a husband can force a woman against her will to endure nine months of pregnancy, expose herself to the life and death risks of childbirth and be respon-

sible for the rearing of a child for nearly two decades.

The implications for a woman of pregnancy and childbirth were vividly described by Judge Lombard writing for the three judge district court in Abele v. Markle, 342 F. Supp. 800, 801-2, vacated and remanded on question of mootness, 410 U.S. 951.

> The decision to carry and bear a child has extraordinary ramifications for a woman. Pregnancy entails profound physical changes. Childbirth presents some danger to life and health. Bearing and raising a child demands difficult psychological and social adjustments. The working or student mother frequently must curtail or end her employment or educational opportunities. The mother with an unwanted child may find that it overtaxes her and her family's financial or emotional resources. The unmarried mother will suffer the stigma of having an illegitimate child. Thus, determining whether or not to bear a child is of fundamental importance to a woman. (Emphasis supplied).

It is an inescapable reality that no matter how much a husband may care for his

child the very process of pregnancy and childbirth places burdens on a woman from which he is free.

Echoing Abele in Roe v. Wade, 410 U.S. 113 and Doe v. Bolton, 410 U.S. 739, this Court specifically recognized the right to abortion as uniquely a woman's right:

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. 410 U.S. at 153.

For such reasons, this Court concluded that laws which restrict a woman's right to abortion, except in carefully delineated ways, violate a woman's constitutional right to privacy, which:

> whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's preservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153 (emphasis supplied).

Although the Court expressly refrained from ruling on the husband's possible rights with respect to the abortion decision, it is quite clear from the above that the privacy right described is not a marital right arising from a distortion of Griswold v. Connecticut, 381 U.S. 479 that can be imposed on the woman, but a personal right as further described by this Court in Eisenstadt v. Baird, 405 U.S. 438:

> It is true that in Griswold the rignt of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (single underlining added).

That personal right harks back to that discussed by this Court in Union Pacific R.R. Co. v. Botsford, 141 U.S. 250, the case

which opens the discussion of privacy in Roe v. Wade. In Botsford,this Court stated:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law. 141 U.S. at 251.

On the basis of Wade, Bolton, and their predecessors, state and federal courts throughout the country, with the single exception of the court below have uniformly concluded that a husband or father cannot interfere with the woman's privacy right to determine whether to bear a child, whether under the aegis of state law or merely on his own whim.

Thus where a husband sought the assistance of state courts to bar his wife's abortion in the absence of state statute, the Supreme Judicial Court of Massachusetts barred the husband's interference. The Massachusetts court scrutinized the nature

of the privacy right found by this Court to form the basis of the fundamental right to abortion. Looking back to Meyer v. Nebraska, 262 U.S. 390, 399; Pierce v. Society of Sisters, 268 U.S. 510, 535; Griswold v. Connecticut, supra, 381 U.S. at 496, and Loving v. Virginia, 388 U.S. 11, 12, the court stated:

> . . . all those cases involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens. See Moose Lodge No. 107 v. Irvis, 407 U.S. 167, 172 (1972); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). We find no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife. Doe v. Doe, S-7885 (S.J.C. Mass., 1974), slip. op. p. 5.

See also Ponter v. Ponter, #C-3599-74, Super. Ct. N.J. (June 9, 1975), p. 5 quoting approvingly , the Massachusetts court's analysis of the privacy right in a case upholding a woman's right to be sterilized without her husband's consent.

The District Court of Appeals of the State of Florida in the case of Jones v. Smith, 278 So.2d 339, 344 (Fla. App. 1973) rejected the efforts of a putative father seeking to enjoin an abortion, stating:

> Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would be ludicrous. It is unquestioned that a woman has a fundamental right to determine whether or not to bear children, see Young Women's Christian Association of Princeton, N.J. v. Kugler, supra, and it would be beyond the province of logic and reason to suggest that she could be compelled to procreate.

Although the court in Jones v. Smith was considering the assertion of right by a putative father where the state statute purported to guarantee the "rights" of husbands, the court made it clear above that neither husband nor father could veto a woman's right to an abortion.

Ruling directly on the constitutionality of that Florida statute, the three-

judge federal court in Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973) held unconstitutional a provision such as that challenged herein on the theory that since the State cannot prohibit a woman from obtaining an abortion during the first two trimesters of pregnancy

> It follows inescapably that the State may not statutorily delegate to husbands and parents an authority the State does not possess. 376 F. Supp. at 698.

See Wolfe v. Schroering, 388 F. Supp. 631, 636 (W.D. Ky, 1974) holding that a woman's right to terminate her pregnancy cannot be conditioned on the consent of others, at least during the first two trimesters. See also Doe v. Rampton, 366 F. Supp. 189 (D. Ut. 1973).

It is clear from the above that at least during the first two trimesters of pregnancy */ the right of a woman to decide

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*/ Amici contend that although under the rulings of this Court the state can elect to restrict her right to abortion in the third trimester, the husband can never compel her to become his beast of burden.

whether or not to terminate her pregnancy is a personal right and not a family right governed by the will of husband or father.

II. THERE IS NO COMPELLING STATE INTEREST WHICH JUSTIFIES VESTING IN THE HUSBAND THE POWER TO CONTROL A WOMAN'S BODY AND LIBERTY BY REQUIRING HER TO PROCREATE.

This Court has recognized that the right to decide whether to bear a child is a fundamental right, which only a compelling state interest can override. Roe v. Wade, supra, 410 U.S. at 155. There is no basis on which this Court can find the state has a compelling, indeed even permissible interest, in conditioning a woman's right to abortion on the consent of her husband (or the putative father).

The Court below suggested three interests to justify the requirement of husband's consent: a) the interest in the future reproductive capacity of marriages; b) the interest of the husband in the survival of a particular fetus*/; and c) the

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*/ The District Court itself appears uncomfortable with this contention, as well it should be, because it implies that he has some sort of property interest in the product of conception.

assumption that procreation and mutuality of decision-making fosters mutual trust and strengthens marital harmony*/.

Whether these interests are viewed from the perspective of a general state interest in fostering procreation and harmony in marriage or from the perspective of a state interest in enforcing the husband's particular expectations against the wife's desires, the assertion of state power to guarantee the husband's control must be viewed as insufficient, irrational and, indeed, as a reprehensible and impermissible extension of the common law subjugation of the married woman to her husband's will.

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*/ Danforth, supra at 1370.

A. A State Interest in Encouraging Procreation In The Marriage Relationship Has Been Rejected As Insufficient.

In Griswold v. Connecticut, 381 U.S. 479, this Court recognized the right of married couples to use contraceptives free of state sanction. Significantly, the state did not even assert as its object the encouragement of procreation in marriage,*/ and such an interest, had it been asserted, would most surely have failed the test in view of the Court's recognition of a realm of privacy surrounding marriage guaranteed against the exertion of state power. supra at pp. 482-486 and 486-499 (Goldberg, J., concurring). Justice Goldberg addressed the question of state power to impose such a

*/ "There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded on any policy of promoting population expansion. supra, at 505 (White, J., concurring).

rule to promote procreation by inverse analogy:

> While it may shock some of my brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would also be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

It is accordingly clear that the State cannot assert, in its own right, an interest in fostering procreation or protecting the procreative capacity of the marriage. And as will be demonstrated hereinafter, the State cannot intrude into the marriage relationship to protect the procreative expectations of one partner thereof. Just

as the prohibition on contraception voided in Griswold was deemed one "having a maximum destructive impact on the relationship," supra at 485, because it would have subjected the couple to state-imposed procreation, so the assertion of a state interest in preserving harmony in the relationship is completely irrational and counterproductive of "a harmony in living," supra at 486, where state power is exercised to allow the husband to force upon his wife an unwanted pregnancy.

B. There Is No Compelling, Let Alone Permissible State Interest In Enforcing The Husband's Will Over That of The Wife.

The question is then, given an irreconcilable difference between husband and wife respecting a reproductive decision or risk, does the State have a compelling interest or right which justifies according primacy to the husband's desire? The spectre of the State effectuating in one person such an awful power over another is even more "repulsive" than was the state-imposed prohibition on contraception struck down in Griswold, supra, at 486.

The interests asserted by the State and accepted by the District Court for sustaining the husband's veto power over the wife's decision to abort must be understood as a distorted vestige of the common law institution of marriage which sanctioned the subjugation of the wife -- body and will -- to her husband. In that light,

and in light of the recent recognition by this Court of the historic discriminatory and oppressive treatment of women by the law, the power asserted here must be decisively rejected. See Frontiero v. Richardson, 411 U.S. 677 (1973).

The statement of Mr. Justice Brennan in Frontiero, supra at 684, that "an attitude of 'romantic paternalism' . . . in practical effect, put women not on a pedestal but in a cage," is nowhere more applicable than to the legally sanctioned supremacy of the husband in the traditional marriage relationship. However painful it may be to acknowledge the subjugation which was rationalized by paternalistic romanticism, it is a critical step to implementing the liberty and equality of woman.

1. The Interests Proferred By The District Court Constitute An Extension Of The Repugnant And Eroded Doctrine Of The Married Woman As Femme Coverte And Chattel Of Her Husband.

To tolerate a statute which permits a husband to force a woman, against her will, to continue an unwanted pregnancy whether it be because of some asserted interest in the particular fetus or in the "future reproductive capacity of the marriage," revives the concept embedded in the common law of the woman's body and services as the property of her husband. To contend that the subjugation of a woman's choice in a matter so fundamental to her life serves to preserve marital harmony, resussitates the fiction of "coverture" which exalted the obliteration of any separate will and identity for the wife.

Historical legal analysis demonstrates, however, that notwithstanding the immense control accorded to the husband by legally

sanctioned presumptions and custom, the veto power contended for here is one which was not accepted even by the common law.

a) Coverture

Coverture flowed from the biblical description that man and woman become "one flesh" upon marriage.*/ As described in the Commentaries of Blackstone**/, coverture meant that

> the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything . . .

While Blackstone praised the disabilities of coverture as protections for the benefit of the woman, concluding that "so great a favorite is the female sex of the Laws of England," (Id. at 445), another man of letters, Alfred, Lord Tennyson, characterized a woman's status before her husband more accurately, as "something better than his dog, a little dearer than his horse." (Locksley Hall 1842).

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*/ Genesis ii, 22-23.

**/ Blackstone's Commentaries 441 (21st Ed. Wendell 1852).

Under coverture, the "one person" recognized in the status of marriage was the person of the husband alone. A woman's property came under the control of her husband, subject to his management, and, at times, his absolute right to alienation. A woman who married was not allowed to convey real property, nor could she sue or be sued without the joinder of her husband. In addition, she was not allowed to contract except under special and limited circumstances, and criminal acts done by her in the presence of her husband were deemed to be his responsibility alone.*/ Although the law ascribed to the wife the responsibility for the rearing of children, even they were seen as the property of the husband. For example, absolute custody of the children rested in

*/ A fuller discussion of the incidents of coverture can be found in Kanowitz, Woman and the Law, 36 et seq.

the husband, to the extent of excluding women even from visitation with them absent a husband's consent.*/

The subjugated condition of the married woman and its necessity to family harmony was exalted in Justice Bradley's now repudiated dissent in Bradwell v. Illinois, 83 U.S. (16 Wall) 130:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views

*/ The husband's absolute control and guardianship over the children was one of the main points of protest in early feminist documents. See, for example, the marriage document signed by Henry B. Blackwell and Lucy Stone in 1855 (found in Kraditor, Up From The Pedestal 149-50 (1968)and in the Declaration of Sentiments adopted at Seneca Falls in 1848 at the first women's rights convention (Id. at 185-188), in which the husband's dominance over the children is renounced. See also 1 Blackstone's Commentaries 445 (21st Ed. Wendell 1852).

> which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state. . .
>
> (emphasis supplied)

b) Vestiges of Coverture

This feudal notion of a woman as, at best, a frail subject of her husband's wishes, and, at worst, no more than an addition to his assets has not yet been entirely wrenched from legal thought. While many of the incidents and disabilities of coverture have been eroded by legal reform, particularly in the area of property rights and commercial transactions*/, the notion that the wife is the husband's possession has died

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*/ The Married Women's Property Acts, enacted in both England and the United States in the latter part of the Nineteenth Century generally restored to women

footnote continued on next page.

much more slowly in those areas touching more personally on the marriage relationship.

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the right to contract, sue and be sued, and to manage and control their separate estates and earnings during marriage.

Typical of the married woman's property reform laws of this period was one first enacted by Missouri in 1889:

> Mo. Stat. Sec. 451.290. A married woman shall be deemed a femme sole so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party . . .

The term "femme sole" was a common legal fiction created to explain the actions of a married woman operating as if single. Apparently, the notion of a married woman simply acting on a par with men as an individual, without such a fictional veil, was beyond the vision of legislators.

While control over marital property remained largely with husbands as well into this century, recent legislation has been aimed at finally eliminating all male prerogatives over jointly-held property and at securing judicial recognition of a stay-at-home spouse's equitable interest in the accumulated property of a wage-earning spouse upon

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1. Woman's Name

Symbolic of the wife's loss of self-identity and society's perception of her as but an adjunct of her husband has been the tradition and laws surrounding married women's names. While the common law never required women to adopt their husband's surnames at marriage, the custom generally prevailed, and continues to prevail today to a lesser extent, that women automatically assume their husband's last, and often, first, names for their own primary identification.*/ As a result, numerous statutory restrictions developed with regard to women's name.**/

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dissolution of the marriage. See, e.g. Johnston, "Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality," 47 NYU L. Rev. 1033, 1070-1086 (1972) and Younger," Community Property, Women, and the Law School Curriculum," 48 NYU L. Rev. 211, 230-240 (1973); The Uniform Marriage and Divorce Act, 9 Uniform Laws Anno. §307 (1973) and Ariz. Rev. Stat. Ann. §25-214 (1956) as amended in 1973; Cal. Civ. Code §5125 (West 1970), as amended in 1973; Idaho Code §39-912 (Supp. 1970), as amended in 1974; N.M. Stat. Ann. §57-4A-7 (1953), as amended in 1975 and Wash. Rev. Code Ann. §26.16.030 (196_), as amended in 1972. See also, United States v. Dege, 364 U.S. 51, rejecting the view that husband and wife are one person, and therefore cannot be held to conspire to violate the criminal law.

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*/ For a brief discussion of the common law of names and customs which have developed regarding married women's names, see, MacDougall,"Kruzel: A Landmark Names Case," 1 Women Law Reporter 1.207 (1975).

**/ See, e.g. Stuart v. Board of Supervisors of Elections for Howard County, 266 Md. 440, 295 A. 2d 223 (1972), which successfully challenged a Maryland re-registration requirement for newly-married women, without regard to an individual woman's choice to retain her birth given name. By contrast, in Forbush v. Wallace, 405 U.S. 970, 92 S. Ct. 1197 (1972), this Court summarily affirmed an Alabama practice requiring married women to register for a driver's license in their husband's surname, distinguishable perhaps since Forbush herself stipulated that the common law of Alabama did require women to adopt their husband's name upon marriage.

The law of names also embodies the common law concept of the child as the husband's property. Many states, which provided that a married woman's name could be changed upon divorce, made an exception where there were minor children of the marriage.*/ Though the common law leaves to the parents the choice of a child's name, married women are faced with official resistance when they attempt to give their children a surname other than that of the father. Unmarried women, on the other hand, meet resistance in attempts to give their children the name of the father, rather than their own last name. Both practices underscore the strong "property" interests assigned to men's names, and the attendant privileges associated with being

*/ See,e.g. Code §25-4-47 (1967) and Wis. Stat. §247.20(1957). By contrast, see Application of Lawrence,133 N.J. Super. 408,337 A. 2d 49 (App. Div. 1975); Petition of Hauptly,312 N.E. 2d 857 (Sup. Ct. Ind. 1974); and Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W. 2d 458 (Sup. Ct. 1975).

a particular man's, rather than woman's child.*/

ii. Woman's Domicile

The wife's lack of separate identity and control was embodied also in the doctrine, still extant in a majority of jurisdictions, that her domicile automatically follows that of her husband, regardless of her own actual or intended residence.**/ Forcing a married woman to assume the domicile of her husband jeopardizes a variety of rights including voting, access to the courts of a particular jurisdiction and access to special tax rates and to tuition

*/ Both these problems have been corrected by the State of Pennsylvania's new health regulations relating to the designation of a child's name. 28 Pa. Code §§1.6 and 1.7, 5 Pa. Bulletin 2926-27 (November 8, 1975).

**/ Kanowitz, Women and the Law 46-52 (1969). See, e.g. Tate v. Tate, 149 W. Va. 591, 142 SE 2d 751 (1965). There is now a move to amend the law of domicile. See, e.g. Colorado Rev. Stat. Ann. §14-2-210 (1973). See also, Green v. Comr. of Corporations and Taxation, 305 NE 2d 92, Mass. Adv. Sh. 1972, 1461, 1466.

reductions at state-supported schools. The unquestioned supremacy of the male choice is reflected in decisions granting a husband a divorce on grounds of desertion for his wife's failure to acquiesce in his choice of domicile.*/

iii. Woman's Obligation To Serve

The traditional law of marriage has also made women almost completely subject to their husband's rule with respect to their maintenance and support. The law assigns to the husband the duty of financial support and the wife, that of provision of domestic services and sexual relations. The wife's services are presumed to be gratuitous and money provided for support and necessaries may not be returned by her

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*/ See, e.g. Dunning v. Dunning, 325 S.W. 2d 315 (1969).

unless she can show the husband specifically intended it as a gift.*/ Moreover, notwithstanding a wife's steadfast performance of services, the courts, on the theory of non-interference in an ongoing marriage, refuse to recognize the legitimacy of a wife's claim of non-support.**/

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*/ See, e.g. Hardy v. Hardy, 235 F. Supp. (D.D.C. 1964), where, upon dissolution of the marriage, Mrs. Hardy was denied the value of a portion of her weekly allowance which she had saved and invested in securities. Recognizing that she could have used this money to pay for domestic services or to provide more generously for her own needs, the Court held nonetheless:

> Acquiescence in these expenditures (for personal needs) does not indicate an acquiescence in the use of such funds for the creation of a portfolio of securities for the wife's own account. To hold otherwise would be to invite disruptive influences in the home. (emphasis supplied)

**/ Perhaps the most celebrated example of a court's refusal to intervene on behalf of a wife claiming non-support during an ongoing marriage is the case of McGuire v. McGuire, 157 Neb. 226, 59 NW 2d 336 (1953). Despite her 33 years of doing farm and domestic work with none of the basic household necessities like running water and despite his substantial assets, the Court held that "the living

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As Blanche Crozier, writing about the legal status of women in 1935, noted, this inability of a wife to enforce the support-services exchange, short of marital dissolution, simply strengthens the perception of the wife as the husband's property during marriage:

> This is precisely the situation in which property finds itself; it may be overworked and underfed, or it may be petted and fed with cream, and that is a matter for the owner to decide. Whether the wife will get much or little is no matter of her legal right but is a matter for the husband to decide. */

The husband's legal control was and is still reinforced by the economic and social relegation of woman to the domestic sphere.

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standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife, it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out."

*/ Crozier, "Marital Support," 15 Boston Univ. L. Rev. 28 (1935). A similar sentiment was expressed

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iv. Woman's Sexual Obligation

Laws which engender a sense of ownership by a man over his wife have been particularly blatant in the area of sexual relations. Until very recently, no American

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by Ernestine Rose, a leader in the campaign for Married Women's Property Acts in 1851: "But it will be said that the husband provides for the wife, or, in other words, he feeds, clothes, and shelters her! I wish I had the power to make everyone before me realize the degradation contained in that idea. Yes! he keeps her, as he does a favorite horse; by law they are both considered his property. Both may, when the cruelty of the owner compels them to run away, be brought back by the strong arm of the law . . . This is humiliating indeed, but nevertheless true; and the sooner these things are known and understood, the better for humanity. It is no fancy sketch. I know that some endeavor to throw the mantle of romance over the subject, and treat women like some ideal existence, not liable to the ills of life. Let those deal in fancy, that have nothing better to deal in; we have to do with sober, sad realities, with stubborn facts."

"Again I shall be told that the law presumes the husband to be kind, affectionate, and ready to provide for and protect his wife. But what right, I ask, has the law to presume at all on the subject? What right has the law to intrust the interest and happiness of one being into the hands of another? And if the merging of the interest of one being into the other is a necessary consequence of marriage, why should the woman always remain on the losing side? Turn the tables . . ." Rose, "On Legal Discrimination" (1851), found in Kraditor, Up From the Pedestal, 222, 225-6 (1968).

jurisdiction recognized a woman's right to seek legal redress against her husband for non-consensual sexual activity, as the marriage contract is seen as allowing a man to use the body of his wife as his own desires dictate*/.

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*/ Traditionally, rape laws have defined the victim as any woman other than the wife of the perpetrator of non-consensual sexual relations, denying wives a cause of action under the criminal law. He is guilty of rape, only if he participates or assists another man in raping her. See Perkins, Criminal Law 152 (2nd ed. 1969). Two recent cases in Israel, El Fakir v. Attorney General, (1964) vol. 4, 18 P.D. 200 and Katib v. Attorney General, (1966) vol. 2, 20 P.D. 136, have, however challenged the assumption, virtually universal in the western world, that forced intercourse is one of a woman's matrimonial duties:

> In my view, this doctrine does not do justice to the dignity of man nor to the dignity of matrimony. . . A wife is not like a 'captive taken with the sword' (Gen. xxxi, 26) in her husband's house and she has the same right of corporal freedom as he . . . El Fakir, supra at 219.

In 1975, South Dakota became the first state to deliberatly amend its rape law to include in its victim class the wife of a perpetrator. SDCL §22-22-1.

On the other hand, should a husband, who discovers his wife engaging in sexual relations, kill the "trespasser," he is excused from criminal liability though his wife would not be*/. Finally, under the common law of torts, men, but not women, have traditionally been able to collect damages for loss of consortium, which includes loss of both domestic services and sexual relations**/.

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*/ See Kanowitz, supra, at 92-93, for examples of such laws and a policy discussion of their sex-based discrimination.

**/ A majority of jurisdictions now extend consortium rights to wives, as well, largely through the influence of case law such as Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950).

c) Critical Limitations
On The Husband's Control

While the control accorded the husband over the wife by the traditional laws of marriage was nearly absolute, the courts balked at being used as an instrument to secure to the husband affirmative control over his wife's body and health against her wishes.

Thus, although a woman could not and almost universally cannot invoke the criminal law of rape to punish her husband for forcible sexual intercourse, he could not invoke the civil law to force her to have intercourse with him. Rather, her refusal to have intercourse has been treated as a ground for annulment or divorce based on constructive abandonment*/. Nor could one spouse

*/ See, e.g. the recent decision, Dudzick v. Dudzick, (N.Y. Sup. Ct. Suff. Co., November 7,1975), 44 U.S.L.W. 2243 (December 2, 1975).

compel the other to have uncontracepted sexual intercourse against his/her will to effectuate the expectation of progeny. Even when procreation was viewed as a primary goal of marriage and sexual activity, the courts would not compel it, but rather recognized it as a cause for dissolution of the marriage.*/ Dissolution and not forced procreation is likewise the only permissible legal solution for a woman's exercise of her right to abortion against her husband's will.

Closely related is the court's traditional unwillingness to recognize a legal right in the husband to veto medical care and treatment chosen by the wife. The wife's consent to medical treatment has been recognized as sufficient to authorize care.

*/ See, e.g. Kreyling v. Kreyling, 20 N.J. 52, 23 A. 2d 800 (1942).

The rule is stated in Am. Jur. 2d §161 that

> [a] married woman in full possession of her faculties has power, without consent of her husband, to submit to a surgical operation upon herself, and he has no inherent power to consent to a dangerous operation on her.

Thus, the wife's consent to treatment has been held to defeat a husband's claim that, absent his consent, he was entitled to damages or to avoid financial liability for the services rendered.

In Janney v. Housekeeper, 70 Md. 162, 16 A. 382 (1888), the Court rejected the husband's claim that doctors who removed his wife's breast because of malignancy were liable for tort because he had consented to the operation only if the tumor was benign, stating at 383:

> . . . if she consented to the operation, the doctors were justified in performing it, if, after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to

> his wife, 'You shall die of Cancer: You cannot be cured, and a surgical operation, affording only temporary relief, will result in useless expense.' The husband had no power to withhold from his wife the medical assistance which her case might require.

The same theory of recovery was propounded and rejected in 1967 in Jeffcoat v. Phillips, 417 S.W. 2d 903 (Tex. Civ. App. 1967), wherein the Court wrote at page 906:

> . . . Appellants also contend to the effect that because there was no proof that Mr. Jeffcoat gave his consent to the operations in question performed on his wife, that coverture was a bar to a valid legal agreement on the part of the wife to consent to the operations in question. . . Appellants cite no authority in support of such proposition, and we have found no authority to support such a proposition. . . . A person does not fall within the classification of 'property' and Mrs. Jeffcoat, a person, had the right to consent to the operations in question if she chose to do so, and her husband's consent was not necessary . (emphasis supplied) */

*/ See also Carstein v. Hanselman, 61 Mich. 426 (1886); Karp v. Cooley, 493 F. 2d 408 (5th Cir. 1974).

Even where, as here, the medical treatment at issue related to the wife's reproductive capacity and was claimed by the husband to deprive him of desired offspring, the law refused to require his consent. Thus a husband was denied damages in tort for an illegal abortion, performed in opposition to his wishes where the wife consented thereto.*/ Moreover, where the treatment complained of was hysterectomy, which irrevocably terminates her childbearing capacity, the courts refuse to condition her right to treatment on the husband's consent. In Murray v. Vandevander,**/ Okla. App. 522 P. 2d 302, the court stated at 304:

> In his petition, plaintiff sought recovery for damage to his 'right to reproduce another child.' We have found no authority and plaintiff has cited none which holds that the husband has a right to a child-bearing wife as an incident to their marriage. We are neither prepared to have a fertile wife nor to allow recovery for damage to such a right. We find that the right of a person who is capable of competent consent to control his own body is paramount. (Emphasis supplied)

We see, therefore, in the area of medical treatment, even that affecting reproduction, a refusal of the law to invest one partner to a marriage with the right to consent or veto treatment sought by the other. Nothwithstanding the breadth of legally sanctioned male supremacy in the institution of marriage, attempts of husbands to assert control in this area have been viewed with a special abhorrence, based as they are on the concept of woman as his disposable property, and subject to his whims alone.

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*/ See, Herko v. Utrillo, 203 Misc. 108,114 N.Y.S. 2d 618 (Sup. Ct. 1952).

**/ See also Pratt v. Davis, 118 Ill. App. 61, 79 N.E. 562 (1906).

2. The Husband's Veto Is Patently Impermissible and Irrational.

There have been moments in the history of this Court's work where power asserted by the State to dominate or interfere with personal lives and decisions has demanded rejection as plainly intolerable and offensive. See e.g. Griswold v. Connecticut, supra; McLaughlin v. Florida, 379 U.S. 184, at pp. 291-292 (Stewart, J., concurring). The husband's consent provision here presents just such an occasion.

Given the practical reality that spousal consent for abortion is, in fact, the husband's right to cancel out a woman's free exercise of abortion choice, the court's stated concern with "the integrity of the marriage unit" seems little more than a thinly-veiled rationalization for assigning ultimate sway over marital planning and harmony to men. Furthermore, delegating to men the authority to preserve "a

fetus" or "the future reproductive capacity of the marriage" simply strengthens the perception of the woman and her body as a proprietary interest of her husband. As such, these or any other proffered bases for the right of consent represent an alarming throwback to a feudal mentality of male supremacy in both the public and domestic spheres of decisionmaking.

For this Court to sustain the spousal consent provision would be not only a virtually precedented extension of the traditionally recognized sphere of the husband's power, but also a repudiation of the important steps taken in its recent decisions to foster the emancipation and equality of women. Eisenstadt v. Baird, supra; Roe v. Wade, supra; Reed v. Reed, 404 U.S. 71 ; Frontiero v. Richardson, supra; Taylor v. Louisiana, ___U.S.___, 95 S. Ct. 704; Weinberger v. Wiesenfeld, ___U.S.___, 95 S. Ct. 1225; and Stanton v. Stanton, __U.S. ___, 95 S. Ct. 1373.

As demonstrated above, the common law's refusal to interfere in an ongoing marriage, has, in light of the multifarious presumptions of the civil and criminal law, left women, who had little choice of alternative means of survival outside of a marriage relationship, subject to the will of their husbands. To depart from the doctrine of non-interference here would be very bizarre indeed. As the Supreme Judicial Court of Massachusetts wrote in Doe v. Doe, supra at p. 5:

> Except in cases involving divorce or separation, our law has not in general undertaken to resolve the many delicate questions inherent in the marriage relationship. We would not order either a husband or a wife to do what is necessary to conceive a child or to prevent conception, any more than we would order either party to do what is necessary to make the other happy.

To interfere here does not promote harmony of spouses, but rather consigns the pregnant married woman to the most

fundamental, irrevocable and inescapable debasement to his will and deprivation of her liberty.

The impact on a woman's liberty of being forced to endure an unwanted pregnancy is incomparable to the impact of her decision to abort on the husband's personal right to procreate. His desire for progeny may be temporarily or perhaps permanently frustrated in that relationship, but it is not abrogated or even significantly impaired and he may be entitled to dissolution of the relationship. Moreover, his personal desire to procreate does not entitle him to use an unwilling spouse's body for that purpose. As discussed by a noted constitutional scholar, to accord him this power would perpetrate a new form of involuntary servitude of woman to man:

> [G]ranting a man the power to force someone to carry and care for his child despite her unwillingness to use her body and life for that

purpose would raise the specter of the legally enforced physical and psychological domination of one group in society by another. A woman in contemporary America who is coerced into submitting herself, at the insistence of a man empowered by law to control her choice, to the pains and anxieties of carrying, delivering, and nurturing a child she did not wish to conceive or does not want to bear and raise, is entitled to believe that more than a play on words has come to link her forced labor with the concept of involuntary servitude. It would, of course, be far-fetched to suggest that the Thirteenth Amendment's prohibition of "slavery" and "involuntary servitude" confers upon women a right to abortion so as to avoid compelled motherhood. But it would be equally insensitive to the deepest meaning of that character of emancipation completely to deny its relevance as a source of guidance in assessing an allocation of roles that embodies the coercive domination of one group by another.

Tribe;"Forward: Toward A Model Of Roles In The Due Process of Law and Life,"87 Harv. L. Rev. 1, 40.

The relevance of the Thirteenth Amendment here is underscored by the parallels between the subjugation of the married woman and the institution of slavery, rec-

ognized by this Court in Frontiero v. Richardson, supra, at 685. The practical and psychological impact of role-typing on a woman's opportunities, expectations and ultimately, on the achievement of equality was sensitively discussed last term in Stanton v. Stanton, supra, 95 S.Ct. at 1378. Here the impact of enforcing spousal veto far transcends the private realm:

> To give men the unreviewable power to sentence women to childbearing and childraising against their will is to delegate a sweeping and unaccountable authority over the lives of others. Any such allocation of roles would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant would inevitably be affected by her knowledge of the power relations thereby created. (fn. omitted)

Tribe, supra at 41.

The impact of giving primacy to the husband's wishes would not only deprive a

wife of her fundamental right to abortion, which right is itself fundamental to her ability to achieve equality in society; it would also enshrine in a penultimate sense the domination of men over women.

For all these reasons, the spousal consent provision, like the prohibition on voluntary contraception, must be rejected as "repulsive," reprehensible and impermissible *per se*.

CONCLUSION

Wherefore, this Court must reverse the District Court and invalidate Section 3(2) of House Bill 1211.

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